89-640

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a lawsuit challenging a vast array of government decisions affecting the use or disposition of approximately 180,000,000 acres of public land, an environmental organization may establish its standing to sue by relying on an affidavit asserting that one member of the organization makes use of property "in the vicinity of" a particular 2,000,000 acre parcel, only 4500 acres of which were affected by one of the challenged decisions.

2. Whether the district court properly entered summary judgment against the respondent for its failure to make a timely showing of its standing to sue.

PARTIES TO THE PROCEEDING

The petitioners are Manuel Lujan, Jr., in his official capacity as Secretary of the Interior; Cy Jamison, in his official capacity as Director of the Bureau of Land Management; and the Department of the Interior. The respondent is the National Wildlife Federation. In addition, the foilowing parties intervened in the proceedings before the district court: Mountain States Legal Foundation; Rep. John Seiberling, succeeded by Rep. Bruce Vento, who intervened for the purpose of supporting respondent on Count II of the Complaint; and The Trust for Public Land, The Department of Water and Power for the City of Los Angeles, The County of Inyo, California, and The California Energy Company, Inc., each of which intervened for the purpose of obtaining an exemption from the preliminary injunction. Finally, ASARCO, Inc. sought intervention in the district court and, as a party to the proceedings before the court of appeals, it appealed from the denial of intervention.

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The Acting Solicitor General, on behalf of the Secretary of the Interior, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 878 F.2d 422. The opinion of the district court (Pet. App. 26a-37a) is reported at 699 F. Supp. 327. Prior opinions of the court of appeals (Pet. App. 38a-115a, 116a-118a) are reported, respectively, at 835 F.2d 305 and 844 F.2d 889, while prior opinions of the district court (Pet. App. 119a-136a, 137a-150a) are reported, respectively, at 676 F. Supp. 271 and 676 F. Supp. 280.

JURISDICTION

The judgment of the court of appeals (Pet. App. 151a) was entered on June 20, 1989. On September 10, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the Constitution extends "[t]he judicial Power * * * to all Cases [and] * * * Controversies."

The Administrative Procedure Act, 5 U.S.C. 702, provides, in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

1. a. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, constitutes the "organic act" of the Bureau of Land Management (BLM or the Bureau), a subdivision of the Department of the Interior. The Act requires the Secretary of the Interior to undertake systematic land use planning for "public lands," which consist of those federally owned lands administered by the BLM. See 43 U.S.C. 1701, 1702(e), 1712. In carrying out that function, the Secretary is directed to develop and employ "land use plans." 43 U.S.C. 1712(a). Although the Act does not define "land use plans," it does provide, in Section 202(c), nine criteria for the development of such plans. 43 U.S.C. 1712(c).

Prior to the enactment of FLPMA, the BLM administered federally owned land under a patchwork of statutes and executive orders. Those directives permitted, among other matters, "withdrawal" and "classification" of the lands. To "withdraw" lands means to withhold discrete areas from disposal under one or more of the general land laws, or to reserve or dedicate lands for a specific purpose. See 43 U.S.C. 1702(j); Public Land Law Review Commission, *One Third of the Nation's Land* 42 (1970). "Classifications" are an administrative tool to designate lands managed by BLM either for specific uses in some cases, or, more generally, for retention or disposal under the public land laws.[1]

In discharging its land use responsibilities prior to FLPMA, BLM developed and employed a form of land use plan known as a "Management Framework Plan" (MFP). The development and use of MFPs began in 1969 and continued until well after FLPMA was enacted in 1976. Many of the plans remain in operation today. FLPMA itself recognizes the existence of this type of land use plan; the Act also expressly authorizes changes in pre-existing classifications and withdrawals. As to classifications, Section 202(d) provides:

> Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted

[1] Although these two management tools are functionally similar, their origins (and their treatment under FLPMA) are different. Prior to FLPMA, withdrawals were generally created by the direct exercise of presidential authority. Classifications are authorized by Congress under the Taylor Grazing Act, 43 U.S.C. 315f, and were required by the Classification and Multiple Use Act, Pub. L. No. 88-607, 78 Stat. 986 (which expired in 1970), to provide an administrative mechanism, short of presidential authority, for classifying lands.

> under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary may modify or terminate any such classification consistent with such land use plans.

43 U.S.C. 1712(d). As to withdrawals, Section 204(a) provides:

> On or after the effective date of this Act the Secretary is authorized to make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations of this section.

43 U.S.C. 1714(a). Section 204(*l*) then sets forth various provisions dealing with the creation and termination of withdrawals, including a subsection requiring the Secretary to review certain existing withdrawals in the eleven contiguous western states that, among other matters, prevent mineral location or leasing. 43 U.S.C. 1714(*l*). That subsection requires the Secretary to report his findings to the President for transmission to Congress by 1991 and, if the President concurs, allows the Secretary to terminate those non-statutory withdrawals unless, within 90 days of transmission, the Congress has adopted a concurrent veto resolution.

b. Pursuant to FLPMA, BLM undertook to review thousands of classifications and withdrawals of federal lands that had been implemented during the preceding decades. In doing so, the Bureau typically relied upon MFPs, which included the following factual materials: "unit resource analyses" of all the natural resources within the planning unit; an ecological profile; an analysis of the social and economic factors affecting land management; and "planning area analyses" that provided an integrated account of the social, economic, resource, and environmental features of the area. After evaluation by an interdisciplinary team of specialists and resolution of any conflicts regarding resource allocation, the MFP would be created. At all stages, but particularly before the MFP became final, the public—at the federal, state, and local level—would be informed about the process and invited to review the plans and proposals. Typically following the preparation of a Land Report containing an Environmental Assessment or Categorical Exclusion required by the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, BLM would decide how, if at all, to alter the designation of the land.

In 1979, BLM issued revised land use regulations, calling for the development of a different type of land use plan, called a Resource Management Plan (RMP). 43 C.F.R. 1610.8(a) (1988). These regulations recognized the continued use of MFPs, and provided for the gradual phase-in of RMPs to replace the MFPs as necessary.

2. a. On July 15, 1985, respondent National Wildlife Federation (hereinafter "respondent") filed the present action, charging that BLM had undertaken a massive program to lift "protective" restrictions on federal lands, in violation of the provisions of FLPMA, the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Rep. Seiberling (who has since retired from the House) intervened in support of respondent, and Mountain States Legal Foundation (MSLF) intervened in support of petitioners.

As subsequently amended, respondent's complaint alleged that the Federation and its members "are suffering and will continue to suffer injury in fact as a result of the challenged actions." Amended Complaint para. 6. In particular, the complaint continued, the Federation's members "use and enjoy the environmental resources that will be adversely affected by the challenged actions." *Ibid.*

The complaint did not, however, identify the "adversely affected" resources, other than by appending a list of 788 notices of "land status actions" published in the *Federal Register* since January 1, 1981. Even that list, the complaint asserted, was "not intended to be inclusive." *Id.* at para. 18.

With those allegations of standing as a predicate, respondent asserted three principal causes of action. First, respondent claimed that petitioners violated FLPMA by failing to prepare RMPs in connection with its classification terminations (covering about 160 million acres) (Count I). Second, the complaint alleged that petitioners violated Section 204(*l*) of FLPMA when they revoked certain withdrawals (affecting about 20 million acres) in eleven western states without first submitting a review recommendation to the President and the Congress (Count II). Third, respondent asserted that petitioners violated FLPMA by failing to provide an opportunity for public participation in the "land use status" decisions (Count VII).

b. On December 4, 1985, the district court denied petitioners' motion to dismiss for failure to join indispensable parties and granted respondent's request for a preliminary injunction (Pet. App. 119a-136a). On a motion for reconsideration, the court also rejected MSLF's contention that respondent had not adequately alleged injury in fact from petitioners' actions (*id.* at 137a-150a). The court issued a nationwide preliminary injunction, enjoining the government from "[t]aking any action inconsistent with any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981" (*id.* at 185a), thereby freezing the status quo as of that date for at least 180 million acres—an area equal to about one-thirteenth of the land mass of all fifty states.

The injunction had sweeping implications. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land transactions, including a land exchange between the Bureau and the State of Arizona under which the federal government would have obtained 500,000 acres of state land scattered throughout wilderness study areas and desert bighorn sheep and riparian wildlife habitat areas, in exchange for 150,000 acres of federal land (Martyak Affidavit at 6-7; J.A. 203-204); revocation of a land withdrawal that otherwise would have permitted the construction of a power-generation dam in the Grand Canyon Recreation Area (Bible Affidavit and attached videotape); and pending or proposed sales of BLM lands near Las Vegas, Nevada, to generate money to permit the Forest Service to purchase environmentally sensitive land in the Lake Tahoe Basin.[2] See Collins Affidavit at 1.

In light of the extraordinary scope of the preliminary injunction, the district court, over the course of the next several months, received numerous requests for exemptions. The court found it necessary to modify the preliminary injunction at the outset, ruling, in an order of February 10, 1986, that the injunction did not directly enjoin the activities of third parties (although the practical effect of the revised injunction was to prohibit third party activities on affected lands in the many cases in which the transaction had not been completed). Pet. App. 145a. Thereafter, in response to federal legislation enacted to revise the court's injunction, the court approved additional amendments to its injunctive order. See, *e.g.*, Order of November 25, 1986 (Pet. App. 169a); Order of April 8, 1988 (Pet. App. 160a-161a); Pub. L. No. 99-542, § 3,

[2] Congress had specifically authorized these transactions in the Burton-Santini Act. Pub. L. No. 96-586, 94 Stat. 3381.

100 Stat. 3038-3039; Pub. L. No. 99-590, § 104, 100 Stat. 3332; Pub. L. No. 99-632, §§ 4, 6-7, 100 Stat. 3520, 3521; Pub. L. No. 99-606, § 12(h), 100 Stat. 3467.[3] Indeed, in one instance, respondent itself sought an exemption from the injunction for a land exchange that all viewed as environmentally beneficial. The court denied that request, without explanation (Order of April 30, 1986, entered May 5, 1986 (Pet. App. 174a-175a)).[4]

c. In May 1986, more than five months after the district court issued its injunction, respondent submitted three affidavits of members to support its standing to challenge the hundreds of land use orders affecting the approximately 180,000,000 acres of public land. The affidavit of Peggy Key Peterson stated (Pet. App. 191a):

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of

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[3] On the other hand, when the Trust for Public Land—another environmental organization—sought to intervene in order to petition the district court to exempt from the injunction a land exchange that would have added 371 acres to various wilderness and forest lands, the district court granted intervention but refused to permit the exemption. Order, March 6, 1986 (Pet. App. 176-177a).

[4] Similarly, in August 1986, the Department of Water and Power for the City of Los Angeles, the California Energy Company, Inc., and the County of Inyo, California sought to intervene in the action to seek exemptions from the preliminary injunction "for the limited purpose of obtaining a declaration that Cal Energy's geothermal operations on Naval Weapons Center lands * * * in the Coso Known Geothermal Resource Area, Inyo, California, are not within the scope of [the injunction]" or for an exemption for these operations. Motions to Intervene, Docket Nos. 188-190 (August 15, 1986). The district court ultimately issued an order interpreting its injunction to exclude these operations, but denying a request to declare that a congressionally-approved exchange of the land on which these operations are conducted is not within the scope of the injunction. Orders, Jan. 6, 1987, and Dec. 31, 1986 (Pet. App. 165a-168a).

> South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened up to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

The affidavit of Richard Loren Erman was virtually identical to the Peterson affidavit, except that it alleged that Mr. Erman uses land "in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest" (Pet. App. 187a). That area, called the Arizona Strip, contains 5.5 million acres, one-eighth of the State of Arizona. Erman claimed injury from potential mining in that area allegedly made possible by Interior's action.

Finally, in support of its claim of "informational standing," respondent submitted a declaration of a vice-president of the organization, Lynn Greenwalt. The Greenwalt declaration alleged injury to the group's ability to acquire and disseminate information about the public lands. Pet. App. 193a-194a.

3. a. The government and MSLF appealed, and a panel of the court of appeals affirmed by a divided vote (Pet. App. 38a-115a). In upholding the preliminary injunction, the court concluded that respondent had "alleged injury in fact sufficient to establish standing to pursue its two FLPMA claims [Counts I and VII] against the Department." *Id.* at 56a. The court noted that respondent had alleged that its members regularly use the lands at issue (*id.* at 51a-52a), and it rejected the contention that those allegations were insufficiently specific. In any event, the court stated (*id.* at 53a-54a):

Even if this lack of specificity were somehow fatal to the complaint, it was cured by the affidavits of two Federation members filed with the district court after issuance of the preliminary injunction. * * * These affidavits provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's actions. Mountain States contends that even these affidavits are insufficient because the named members claim only to use resources in the "vicinity" of the land covered by the challenged withdrawal revocations. The Federation's allegations in this regard however comport with those in [*United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)]; they therefore are sufficiently specific for purposes of a motion to dismiss.[5]

Judge Williams concurred in the judgment on the standing issue, but wrote separately "in the hopes of clarifying what a plaintiff must show to meet the injury-in-fact component of standing when it seeks a preliminary injunction" (Pet. App. 85a-86a). He stated that "NWF challenges the legality of two programs—classification terminations and withdrawal revocations—that together affect over 180 million acres of public lands" (*id.* at 86a). He reasoned that standing principles require that respondent (*ibid.*):

> (1) identify lands that are affected by each program; (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities; and (3) identify activities of members in specific areas that would suffer an adverse impact from such third party conduct.

[5] The court also held that respondent had not failed to join indispensable third parties or exhaust its administrative remedies, and that the complaint was not barred by laches. Pet. App. 57a-65a.

Judge Williams concluded that while respondent had adequately identified the land at issue, "[a]s to the other elements, NWF's submissions were markedly defective" (*id.* at 89a). In particular, he explained, the allegations in the complaint were "too vague," as were the assertions contained in respondent's affidavits (*ibid.*). He nevertheless concluded that the record "provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff's members on the lands named in the affidavits" (*id.* at 90a).[6]

b. The government and MSLF thereafter filed petitions for rehearing, and the panel denied the petitions in a per curiam memorandum. Pet. App. 116a-118a. In doing so, however, the court recognized that "some of the criticisms of the breadth and the scope of the preliminary injunction offered in the vigorous dissent are not without force" (*id.* at 117a-118a). It also acknowledged that "the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below" (*id.* at 118a). The court therefore "issue[d] its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch" (*ibid.*).

4. a. In July 1986, following the remand, respondent filed a motion for summary judgment, and the govern-

[6] Judge Williams dissented from the court's affirmance of the preliminary injunction, concluding that respondent was not likely to prevail on the merits, that it had failed to show a sufficient threat of irreparable harm, and that the potential threat of harm to other parties and to the public interest weighed against the issuance of an injunction. Pet. App. 99a-115a.

ment thereafter served 16 notices of deposition to discover the basis of respondent's allegations of standing. Respondent parried that request by successfully obtaining an order from the district court precluding the government from conducting discovery, asserting that any such discovery "would be unreasonably cumulative, duplicative, burdensome and expensive" (*Motion to Quash and for a Protective Order* at 7; Pet. App. 170a).

In support of a cross-motion for summary judgment, the government submitted extensive affidavits addressed to the question of standing. For its part, respondent continued to base its standing on the three affidavits identified by the court of appeals, filing no additional affidavits within the time allotted under Fed. R. Civ. P. 56. At the close of the July 1988 hearing, however, the district court requested supplemental briefing on the question of NWF's standing. In response to that request, respondent submitted four additional affidavits. The district court refused to consider those affidavits, finding that they were "untimely and in violation of our Order" (Pet. App. 28a-29a n.3).

b. On November 4, 1988, the district court vacated the outstanding preliminary injunction, granted the government's motion for summary judgment, and dismissed the action for want of standing (Pet. App. 26a-37a). The court explained that to establish its standing, respondent was required to "plead and prove that it or its members have suffered some actual or threatened injury as the result of defendants' allegedly unlawful conduct" (*id.* at 31a). The court found that respondent had failed to meet that burden.[7]

[7] The court noted that the previous ruling concerning standing "arose in the posture of defendant's motion to dismiss, which affected the degree of factual specificity required to be shown in order to establish the likelihood of personal injury to plaintiff's members" (Pet. App. 29a). On a motion for summary judgment, it explained, a court is entitled to reconsider a preliminary determination of standing (*id.* at 30a).

The court first examined respondent's claim that the government had not permitted sufficient public participation in its review process. On that claim, the court noted, respondent based its standing on the Greenwalt affidavit, which simply stated that the Federation's ability to meet its obligation to its members " 'has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and public participation with respect to the Land Withdrawal Review Program' " (Pet. App. 32a). The court found that statement "conclusory and completely devoid of specific facts" (*ibid.*), concluding that it provided "no basis to support [respondent's] claim of standing" (*ibid.*).[8]

The court turned next to respondent's claim of standing based on alleged environmental harm to its members resulting from the termination of classifications and the revocation of withdrawals. It first observed that any harm to NWF's members would result from the response of third parties (such as mining companies) to the government's actions and that " 'the judgment regarding the likelihood of injury turns on whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action' " (Pet. App. 34a). The court observed that respondent "rest[ed] its entire claim of standing to sue for environmental injury on the affidavits of two persons, *i.e.*, Peggy Peterson and Richard Erman" (*ibid.*), which "use the same boiler plate language and format" (*id.* at 34a n.10). The court ob-

[8] The court also noted that "[a]lthough not required to do so, because defendants did not have the burden to disprove plaintiff's conclusory contention, defendants have advised plaintiff of the environmental documentation and the methodology employed and have made its [*sic*] extensive files containing such information available for plaintiff's inspection" (Pet. App. 32a n.8).

served that Peterson's affidavit simply "claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" and that her enjoyment has been "adversely affected as the result of the decision of the BLM to open it to the staking of mining claims and oil and gas leasing" (*id.* at 34a-35a). Based on the government's affidavits, however, the court noted that 1,993,500 acres of the 2-million acre South Pass-Green Mountain area (about 99.675%) had always been open to mining and mineral leasing and that petitioners' termination of the relevant classification opened up only an additional 4500 acres (.225%) of that area. See *id.* at 35a. The court observed that Peterson's affidavit, which simply asserted that "she uses lands 'in the vicinity' " of the 2,000,000 acre area, failed to establish that her use "extend[ed] to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination" (*ibid.*).

The court concluded that the Erman affidavit was "similarly flawed." Pet. App. 35a. Erman, the court noted, asserted that he used federal lands "in the vicinity" of the Grand Canyon National Park and the Arizona Strip and that his enjoyment would be adversely affected by the BLM's actions, "with particular reference to the opening and staking of mining claims" in that 5.5 million acre area, "an area one-eighth the size of the State of Arizona" (*id.* at 35a-36a). The government's affidavits showed, however, that "virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining" (*id.* at 36a), and that the "revocation of withdrawal concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining" (*ibid.*). The court concluded (*id.* at 36a-37a):

> Both the Peterson and Erman Affidavits are vague, conclusory and lack factual specificity. They do not and cannot show "injury in fact" with respect to the two specific areas in Wyoming and Arizona in the vicinity of which these affiants claim to be located. More important, standing alone, these two affidavits do not provide any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations. It should be noted that plaintiff's claims of injury reach hundreds of decisions affecting 180 million acres spread over seventeen states. Since plaintiff lacks standing in the constitutional sense or as an "aggrieved party" under Section 702 of the APA, we lack subject matter jurisdiction and dismiss for lack of standing.[9]

5. The court of appeals reversed (Pet. App. 1a-25a). The court first ruled that the Peterson affidavit, by itself, sufficiently established "injury-in-fact" to withstand summary judgment under Section 702 of the APA and the Constitution (*id.* at 15a-16a). The court acknowledged that the affidavit did not state that Peterson had used the 4500 acres in South Pass-Green Mountain that were actually opened to mining and mineral leasing (*id.* at 16a-17a). It reasoned, however, that (*id.* at 17a (citation omitted)):

> The language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise *her* use and enjoy-

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[9] In light of its standing decision, the district court found it unnecessary to reach "the merits of plaintiff's claim for injunctive relief" (Pet. App. 37a). It noted, however, that Judge Williams' dissenting opinion "mirrored many of the[ ] problems in its discussion of our grant of preliminary injunction" (*ibid.*).

> ment would not be "adversely affected." * * * If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. The District Court in no way questions the *veracity* or *clarity* of the affidavit, only its *specificity*. * * * But the trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.

The court added that, "[a]t a minimum," the affidavit is ambiguous, and thus, on summary judgment, the district court should have resolved that ambiguity in favor of the non-moving party, in this case the respondent. *Ibid.*[10]

The court of appeals also held that the law of the case doctrine required a ruling on the standing question in respondent's favor. Pet. App. 18a-20a. The court noted that in affirming the preliminary injunction issued by the district court, a previous panel had rejected a challenge to respondent's standing. *Id.* at 18a-19a. The court reasoned that since "the burden for establishing irreparable harm to support a request for a *preliminary injunction* is, if anything, *at least as great* as the burden of resisting a *summary judgment motion*" (*id.* at 20a), the prior decision "upholding petitioners' standing is therefore the law of the case, which disposes of this appeal" (*ibid.*).

Finally, the court found it "unfair and an abuse of discretion for the trial court to refuse to consider the affidavits submitted by NWF when the court asked for supplemental memoranda on the standing issue" (Pet. App. 21a). The court surmised that "[n]o party to this litigation

[10] The court noted that since it found the Peterson affidavit sufficient to survive summary judgment, it did not need to address the sufficiency of the Greenwalt and Erman affidavits. Pet. App. 18a n.13.

seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests" (*ibid.*).[11]

Having rejected petitioners' summary judgment challenge to respondent's standing, the court directed the trial court, on remand, to "address NWF's claims on the merits and fashion whatever relief it deems appropriate" (Pet. App. 24a). It "decline[d], however, to reinstate the preliminary injunction because the case should now proceed with dispatch" (*id.* at 25a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals expands the standing doctrine beyond meaningful limitation. Departing from the already generous standards articulated in *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669 (1973), and *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the court below accepted a single, vague allegation—one member's use of land "in the vicinity of" a two million acre area—as a sufficient basis for challenging hundreds of separate land use and disposition decisions affecting some 180,000,000 acres of public lands. To do so, the court was constrained to "presume" that the affiant intended to assert an interest in a particular 4500 acre area—although the affiant had never adverted to that parcel, let alone asserted a personal interest in it.

The court's misapplication of standing principles, left undisturbed, will permit respondent, and similar plaintiffs

[11] In a footnote, the court held that, having established its standing to challenge one particular land action, respondent therefore had standing to challenge all of the hundreds of land actions involved in the case. Pet. App. 16a n.12.

in the future, to petition federal courts for far-reaching relief from injuries that they have not shown any likelihood of suffering. The decision thus threatens to draw the courts into disputes that lack "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). And once drawn so comprehensively into the fray, the courts will inevitably assume (as exemplified by the nationwide preliminary injunction here) managerial responsibilities for wide-ranging federal activities—activities whose administration properly belongs in the Executive Branch.

1. a. Article III of the Constitution limits the judicial power to "Cases, [and] Controversies[.]" To establish standing under Article III, a plaintiff must allege a personal injury that is fairly traceable to the defendant's unlawful conduct and that is likely to be redressed by the relief sought. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The injury cannot be an "abstract" or "hypothetical" one (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983)); it must be " 'distinct and palpable' " (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). Only by identifying a concrete injury-in-fact can a plaintiff " 'allege[ ] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975), quoting *Baker* v. *Carr*, 369 U.S. at 204).

The Administrative Procedure Act, 5 U.S.C. 702, under which this suit was filed, complements Article III standing by limiting challenges to parties who are "aggrieved or adversely affected" by a governmental action. Under Section 702, the Court has required plaintiffs to show that they are personally injured and that their injury is caused by the challenged action. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. at 472, 487-488 n.24; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Sierra Club* v. *Morton*, 405 U.S. at 732-733 & n.3.[12]

To be sure, the Court's decisions in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), and *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669 (1973), on which the court of appeals relied (Pet. App. 14a-15a, 17a), took a somewhat expansive view of standing. But in both cases the Court nonetheless insisted upon a clear showing of direct and personal injury. Thus, in *Sierra Club*, the Court held that the mere assertion that the Club had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" was not enough to confer standing. 405 U.S. at 730. Because the Sierra Club had failed to allege any individualized interest in the specific lands in dispute, the Court rejected its standing claim. *Id.* at 734-735. Similarly, in the *SCRAP* case, in which the Court upheld the plaintiffs' standing, the Court emphasized that the plaintiffs had specifically alleged that their members "used the forests, streams, mountains, and other resources in the Washington metropolitan area" (412

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[12] Section 702 also requires plaintiffs to show that " 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 395-396 (1987), quoting *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970).

U.S. at 685)—resources which, according to the allegations in the complaint, would be "directly harm[ed]" by the challenged government action (*id.* at 687).

b. Respondent made no such showing in the present case. The single affidavit on which the court of appeals relied—the Peterson affidavit—stated only that a single member uses land "in the vicinity of" a two million acre area. That area contains, scattered within it, no more than 4500 acres of land (.225% of the total) affected by the challenged land status actions in this case. But nothing in the Peterson affidavit suggests that the affiant has any connection with the affected lands—just that she uses and enjoys land "in the vicinity of" the millions of acres that surround them. And with that weak toehold, respondent secured standing to challenge not only the two million acre parcel identified in the affidavit, but also the remaining 178,000,000 acres of public lands whose status is in dispute.

In granting summary judgment on the record before it, the district court correctly concluded that respondent's standing allegations were "vague, conclusory, and lack factual specificity." Pet. App. 36a.[13] The court of appeals held otherwise only by "presum[ing]" language that the affidavit simply does not contain. In the court's view, "[t]he language of Peterson's affidavit can be read to *presume* that the 4500 newly opened acres included the areas that Peterson uses; otherwise, *her* use and enjoyment would not be 'adversely affected.'" *Id.* at 17a. The court's reasoning is exactly backwards; it "presumed" the requisite

[13] See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment • • • against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case").

standing allegations because, had it not done so, respondent's standing claim "would be meaningless, or perjurious" (*ibid.*). The court's presumption—that a mere claim of standing necessarily implies a factual basis to support it—wholly nullifies the standing requirement. It is precisely because Peterson did *not* allege any use of, or other interest in, the affected land that respondent lacks standing to challenge the government's actions. The court below had no warrant for imputing to the affiant allegations that she did not—and perhaps could not—make on her own. Furthermore, the court grossly compounded its error by ignoring the total lack of nexus between Peterson's faulty affidavit and the vast additional lands throughout the Nation comprehended in the suit.[14]

2. Standing requirements take on added significance when an exercise of judicial power would "affect[ ] relationships between coequal arms of the National Government," because " 'repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either' " (*Valley Forge*, 454 U.S. at 473-474, quoting *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Indeed, the standing requirements themselves arise out of a "single basic idea—the idea of separation of powers" (*Allen* v. *Wright*, 468 U.S. at 752)—in that they demarcate funda-

[14] The court of appeals alternatively surmised that the Peterson affidavit was, at worst, ambiguous, thereby preventing entry of summary judgment. Pet. App. 17a. That conclusion was also wrong. Ambiguity, without more, is not grounds for resisting summary judgment. To the contrary, under Fed. R. Civ. P. 56(e), it is up to the plaintiff to "set forth specific facts showing that there is a genuine issue for trial." See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Respondent had ample opportunity prior to the hearing to meet that burden, but failed to do so.

mental limits on the role of the federal courts in our tripartite system of government. Departures from the rules of standing may rupture those limits. "Relaxation of standing requirements is directly related to the expansion of judicial power" (*Richardson,* 418 U.S. at 188 (Powell, J., concurring)), and such relaxation may bring into court "generalized grievances more appropriately addressed in the representative branches" (*Allen,* 468 U.S. at 751).

The present case conspicuously illustrates the separation-of-powers concerns implicated by a basic misapplication of standing principles. Indeed, the very scope of the litigation reflects its lack of Article III moorings. Early on, the district court entered, and the court of appeals sustained, a preliminary injunction freezing—for nearly three years—the status of almost 180 million acres of public land. That acreage amounts to approximately 281,000 square miles, a size exceeding that of all the states on the eastern seaboard from North Carolina to Maine. In addition to halting more than 260 agricultural entries, the injunction froze hundreds of land sales and exchanges, including at least one transfer that even respondent acknowledged to be environmentally beneficial. See p. 8, *supra.* And in administering that injunction, the district court was required to assume the role of a nationwide land use czar—fielding an array of conflicting claims for exemptions, granting some, while rejecting others. See pp. 7-8 & notes 3, 4, *supra.*

But even without the injunction in place (for now), the litigation is overwhelming. If remanded, the case will require the trial court to review administrative records relating to the hundreds of individual land decisions challenged by respondent, and to determine in each instance whether the land use plan on which petitioners relied satisfied the requirements of FLPMA. Managing a litigation of such dimension aggregates expansive powers in the court,

and withdraws them, correspondingly, from the executive officials charged by law with the day-to-day responsibility for adminstering the public lands. The result, in this case, is a lawsuit seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA.

Standing doctrines are designed to avoid such clashes between judicial and executive authority. Under our constitutional system, the judicial power may be invoked to resolve controversies between persons adversely affected by a particular government action and the officials who took that action, not to supervise public officials' general conduct of their duties. In this case, the failure of the district court (at first) and the court of appeals (throughout) to adhere to this basic precept of judicial power under Article III has led to "adjudication in a vacuum" (Pet. App. 105a)—a vacuum in which the court imposed massive injunctive relief, controlling a huge amount of public land and unrepresented third parties, without any showing of injury-in-fact to respondent or any of its members. The court of appeals has now ordered this massive case to proceed to trial on the same flawed premise. The court's fundamental misapplication of standing principles warrants this Court's review.[15]

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[15] The court of appeals adduced two alternative bases for its resolution of the standing question, but neither has any force. First, the court held that the prior panel decision on the appeal from the entry of the preliminary injunction constituted the "law of the case" and therefore precluded reconsideration of respondent's standing at the summary judgment stage. But a court is always free (indeed, where necessary, required) to examine its own jurisdiction, including a plaintiff's standing to commence an action. Moreover, allegations of injury that may be sufficient to survive a motion to dismiss or to warrant a preliminary injunction may not be sufficient to withstand a motion for summary judgment—which will typically be made on a fuller

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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record, developed after more extensive discovery. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981); *United States* v. *SCRAP*, 412 U.S. at 689. Indeed, notwithstanding the second panel's determination (Pet. App. 19a-20a), the first panel decision in this case recognized that very point, stating that the allegations in the affidavit were "sufficiently specific *for purposes of a motion to dismiss*" (*id.* at 54a (emphasis added)). In any event, the earlier panel decision, which was predicated on the same cursory affidavits that were before the court of appeals the second time around, is mistaken for the same reasons we have noted above. What is more, this Court's review of the court of appeals' standing decision is not affected by whether *that* court was bound by its own law of the case.

The court also defended its standing decision on the ground that the district court should have considered the supplementary affidavits submitted by respondent, in violation of Fed. R. Civ. P. 56(c), after the hearing on summary judgment. In view of the tardiness of that submission, and respondent's previous resolute insistence that the first three affidavits were sufficient, it was not an abuse of the trial court's discretion to refuse to accept the new material. The court of appeals' ruling on this point, accordingly, should also be reversed. Moreover, at a minimum, the government should have been entitled to contest the sufficiency and bona fides of the new submissions.

* The Solicitor General is disqualified in this case.